LAKSMANA REALTY SDN BHD

v.

GOH ENG HWA

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
AZMEL MAAMOR JCA
[CIVIL APPEAL NO: M-02-388-2001]
24 NOVEMBER 2005

CIVIL PROCEDURE: *Execution - Writ of possession - Whether writ of possession authorises plaintiff to remove defendant's goods*

CIVIL PROCEDURE: *Pleadings - Damages - Distinction between general and special damages*

CIVIL PROCEDURE: *Appeal - Fact, findings of - When should appellate court interfere with findings of fact by trial judge*

TORT: *Damages - Exemplary damages - Whether one party obtained profit at expense of the other's rights - Whether there was conduct calculated to make profit at other party's expense*

The plaintiff/appellant in the first appeal was the owner of a piece of land ("the land"). At all material times the defendant/respondent in the first appeal was in occupation of the land. The plaintiff and the defendant entered into an agreement by which the defendant was to surrender that portion of the land occupied by him together with the house thereon to the plaintiff in consideration of the plaintiff paying to the defendant a certain sum of money as compensation. According to the agreement, the defendant and all those claiming under or through him were to vacate the land on or before 15 August 1984, and in the event the defendant failed to deliver vacant possession by the said date, the plaintiff was "entitled to take eviction proceedings" against him.

The plaintiff did not take any steps to enforce the agreement for quite some time. It issued a writ only on 7 November 1991. The defendant entered appearance but defaulted in delivering his defence. On 26 May 1992 the plaintiff entered judgment in default of defence. The defendant then took out a summons to set aside the default judgment and served the summons on the plaintiff. The plaintiff then applied for a writ of possession and proceeded to execute it. Pursuant to the execution, the defendant's goods were removed from the land and were placed by the roadside near another piece of land

belonging to the plaintiff. A quantity of these goods were lost. The default judgment was set aside on 28 November 1995. The defendant then counterclaimed for trespass to goods and conversion. In support of its case, the defendant called an expert witness who had information about the nature of the defendant's stock-in-trade from the defendant himself.

The learned judge found for the defendant holding that although the bailiff had executed the writ of possession, the defendant's goods had been removed by the plaintiff's servants or agents. It was found that so far as the bailiff's role in the removal of the defendant's goods was concerned, he had acted as the plaintiff's agent. The learned judge awarded the defendant, inter alia, a sum of RM400,000 as general damages and a sum of RM50,000 as exemplary damages. Before the Court of Appeal, the plaintiff submitted that the expert's evidence was hearsay. The plaintiff also claimed that the learned trial judge did not critically analyse the defendant's evidence on the value of his trade and business goods. The defendant's claim as formulated in his counterclaim was that the goods in question were worth more than RM800,000. What the learned judge did was to award about half that figure. In doing so, he had accepted the defendant's version that the receipts for the goods had been lost.

Held (allowing the plaintiff's appeal in part and setting aside the award for exemplary damages)
Per Gopal Sri Ram JCA:

[1] The finding that the plaintiff had interfered with the defendant's goods without lawful justification was correct. The writ of possession did not authorise the plaintiff to remove the defendant's goods. If the plaintiff wanted to have those goods removed, then it should have obtained an order from the court in that behalf. (p 877 g)

[2] The expert's evidence was not hearsay since the defendant himself had given evidence and was cross-examined at length about the value of his goods. So, no question of hearsay arose. (p 878 g)

[3] The learned judge was perfectly entitled to make the findings he did about the lost receipts and this court, in accordance with well settled principles, should not interfere with his decision on the point. The learned judge had also correctly addressed his mind to the crucial fact that the plaintiff did not challenge the number of goods that formed the subject matter of the defendant's claim. This, seriously restricted the plaintiff and this court from raising any question about the items that went missing. All that was left for the learned judge was to place a value on the missing goods. (p 879 d & f)

[4] The classification of the defendant's claim in his counterclaim as general damages was, with great respect to the learned judge, an error. General damages are awarded for harm that is not quantifiable. Special damages are awarded where the damage suffered is readily quantifiable in monetary terms. In this case, the defendant's goods was something that was readily quantifiable and thus compensation for the loss of the goods was special damages. But this error did not flaw the judgment under appeal. The learned judge had taken into account all those factors that usually influence a court making an assessment of special damages. The plaintiff had not discharged its burden by demonstrating that the learned judge's finding on quantum was unsupported by any evidence or suffered from an error in principle. (p 880 d-h)

[5] What the plaintiff was seeking to do was to get possession of its land. It was entitled to have its land back. No question of obtaining a profit at the expense of the defendant's rights arose here. Although the plaintiff had tried to steal a march on the defendant by seeking the writ of possession after it had notice of the application to set aside the default judgment, this is not conduct calculated to make a profit at the defendant's expense. At best it was a procedural misconduct for which they were mulcted in costs. This was not a case for exemplary damages. (p 883 d-e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif/perayu dalam rayuan pertama adalah pemilik sebidang tanah ("tanah tersebut"). Pada semua masa yang matan, defendan/responden dalam rayuan pertama telah menduduki tanah tersebut. Plaintif dan defendan telah memasuki satu perjanjian di mana defendan perlu menyerahkan bahagian tanah tersebut bersama rumah yang didudukinya kepada plaintif atas balasan plaintif membayar kepada defendan satu jumlah wang sebagai pampasan. Menurut perjanjian tersebut, defendan dan semua orang yang menuntut di bawah atau melaluinya perlu mengosongkan tanah tersebut pada atau sebelum 15 Ogos 1984 dan sekiranya defendan gagal memberikan milikan kosong sebelum tarikh itu, plaintif "berhak mengambil prosiding pengusiran" terhadapnya.

Plaintif telah tidak mengambil sebarang langkah untuk melaksanakan perjanjian tersebut untuk sekian lama. Ia telah hanya mengeluarkan writ pada 7 November 1991. Defendan telah memasukkan kehadiran tetapi gagal menyerahkan pembelaannya. Jadi, pada 26 Mei 1992 plaintif telah memasukkan penghakiman ingkar pliding. Defendan kemudian telah mengeluarkan satu saman untuk mengenepikan penghakiman ingkar tersebut dan telah menyerahkan saman tersebut terhadap plaintif. Sebaik sahaja ia diserahkan dengan saman defendan, plaintif telah memohon untuk satu writ pemilikan dan telah terus

melaksanakannya. Lanjutan daripada pelaksanaan itu, barang-barang defendan telah dikeluarkan daripada tanah tersebut dan diletakkan di tepi jalan dekat satu lagi tanah milik plaintif. Beberapa barang tersebut telah hilang. Penghakiman ingkar tersebut telah diketepikan pada 28 November 1995. Defendan telah selepas itu membuat tuntutanbalas untuk pencerobohan kepada barangan dan konversi. Sebagai menyokong kesnya, defendan telah memanggil seorang saksi pakar yang telah mendapatkan maklumatnya mengenai jenis barangan perniagaan defendan daripada defendan sendiri.

Hakim yang bijaksana telah membuat penemuan bagi pihak defendan dan telah memutuskan bahawa walaupun bailif telah melaksanakan writ pemilikan, barang-barang defendan telah dikeluarkan oleh pesuruh-pesuruh atau ejen plaintif. Juga telah ditemui bahawa berkenaan dengan peranan yang dimainkan oleh bailif dalam mengeluarkan barang-barang defendan, ia telah bertindak sebagai ejen plaintif. Hakim yang bijaksana telah mengawardkan defendan, inter alia, sejumlah RM400,000 sebagai gantirugi am dan sejumlah RM50,000 sebagai gantirugi teladan. Dalam rayuan, plaintif telah berhujah bahawa keterangan pakar adalah dengarcakap. Plaintif juga telah mengatakan yang hakim yang bijaksana telah gagal menganalisakan secara terperinci keterangan defendan mengenai nilai barang-barang perniagaannya. Tuntutan defendan seperti yang dinyatakan di dalam tuntutanbalasnya adalah bahawa barang-barang berkenaan adalah bernilai lebih daripada RM800,000. Apa yang dilakukan oleh hakim yang bijaksana ialah mengawardkan lebih kurang separuh daripada jumlah ini. Dalam berbuat demikian, beliau telah menerima versi defendan bahawa resit-resit untuk barang-barang tersebut telah hilang.

Diputuskan (membenarkan rayuan plaintif dalam sebahagian dan mengenepikan award untuk gantirugi teladan)
Oleh Gopal Sri Ram HMR:

[1] Penemuan bahawa plaintif telah bercampur tangan dengan barang-barang defendan tanpa justifikasi yang sah di sisi undang-undang adalah betul. Writ pemilikan tidak memberi kuasa kepada plaintif untuk mengeluarkan barang-barang defendan. Sekiranya plaintif hendak mengeluarkan barang-barang tersebut, ia sepatutnya mendapatkan satu perintah dari mahkamah untuk berbuat demikian.

[2] Keterangan pakar bukanlah dengarcakap kerana defendan sendiri telah memberikan keterangan dan telah disoal silang secara panjang lebar mengenai nilai barang-barang perniagaannya. Jadi, tiada isu mengenai dengarcakap timbul.

[3] Hakim yang bijaksana berhak membuat penemuan seperti yang telah dilakukannya mengenai resit-resit yang hilang itu dan Mahkamah ini, mengikut rukun-rukun yang jelas telah ditetapkan, tidak harus bercampur tangan dengan keputusannya dalam hal ini. Hakim yang bijaksana juga telah dengan betul mengambilkira fakta penting bahawa plaintif telah tidak mencabar jumlah barang-barang yang menjadi subjek yang terlibat dalam tuntutan defendan. Ini secara serius telah mengongkong plaintif dan Mahkamah ini dari membangkitkan apa jua persoalan mengenai barang-barang yang telah hilang. Apa yang perlu dibuat oleh hakim yang bijaksana ialah hanya meletakkan satu nilai ke atas barang-barang yang hilang itu.

[4] Klasifikasi tuntutan defendan dalam tuntutanbalasnya sebagai gantirugi am adalah, dengan hormatnya, satu kekhilafan. Gantirugi am adalah diawardkan untuk kehilangan yang tidak boleh dikuantifikasikan. Gantirugi khas adalah diawardkan di mana kehilangan yang dialami itu boleh dikuantifikasikan dengan mudah dari segi kewangan. Jadi, di dalam kes ini, nilai yang perlu diletakkan pada barang-barang defendan adalah satu yang boleh dikuantifikasikan dengan mudah dan pampasan bagi kehilangan barang-barang tersebut adalah gantirugi khas. Walau bagaimanapun, kekhilafan ini tidak mencacatkan penghakiman yang dirayukan itu. Hakim yang bijaksana telah mengambilkira semua faktor-faktor yang biasanya mempengaruhi sesuatu mahkamah itu dalam membuat perkiraan gantirugi khas. Plaintif telah gagal melepaskan beban buktinya dengan menunjukkan bahawa penemuan hakim yang bijaksana berkenaan dengan kuantum tidak disokong oleh apa-apa keterangan atau khilaf dari segi prinsip.

[5] Apa yang cuba dilakukan oleh plaintif adalah untuk mendapatkan milikan tanahnya. Ia berhak mendapatkan kembali tanahnya. Tiada persoalan mendapatkan keuntungan secara menjejaskan hak defendan timbul di sini. Walaupun plaintif telah cuba mendahului defendan dengan mendapatkan writ pemilikan selepas ia mempunyai notis mengenai permohonan untuk mengenepikan penghakiman, ini bukanlah kelakuan yang bertujuan membuat keuntungan secara menjejaskan defendan. Ianya hanyalah satu kesalahlakuan prosedur untuk yang mana mereka telah dilemparkan dengan kos. Ini bukanlah satu kes untuk gentirugi teladan.

Case(s) referred to:
Marian Rebello v. K Periathamby [1931-1932] FMSLR 37 ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Ryan v. Jarvis [2005] UKPC 27 ***(refd)***
Tan Kuan Yau v. Suhindrimani [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***

(Civil Appeal No: M-02-388-2001)
For the appellant - Trevor George De Silva (Mohd Rohaisherin Rosli with him); M/s Lee Ong & Kandiah
For the respondent - B Thangaraj (Azad Baashir with him); M/s Bashir & Asha

(Civil Appeal No: M-02-530-2001)
For the appellant - B Thangaraj (Azad Baashir with him); M/s Bashir & Asha
For the respondent - Trevor George De Silva (Mohd Rohaisherin Rosli with him); M/s Lee Ong & Kandiah

[Appeal from High Court, Melaka; Civil Suit No: 22-144-1991]

Reported by Amutha Suppayah

JUDGMENT

Gopal Sri Ram JCA:

There are two appeals before us. We heard argument on them on 1 August 2005 and reserved judgment. Both appeals relate to the quantum of damages awarded by the learned trial judge. The factual matrix against which these appeals rest is as follows.

The appellant in the first appeal (plaintiff in the court below) is the owner of a piece of land. I will call it "the Semabok land". At all material times the respondent in the first appeal (defendant in the court below) was in occupation of the Semabok land. On 11 August 1983, the plaintiff and defendant entered into an agreement ("the August 1983 agreement") the relevant terms of which were these:

(i) the defendant was to "assign and or surrender all his interest and rights in and to the portion of the said land occupied by him together with the said house" to the plaintiff;

(ii) in consideration of the defendant's promise, the plaintiff was to pay the defendant a certain sum of money as compensation. The plaintiff said it had to pay RM30,000. But the defendant said that he had been promised RM100,000. The quantum of the payment therefore became the subject matter of a fully blown dispute;

(iii) the defendant and all those claiming under or through him were to vacate the Semabok land on or before 15 August 1984;

(iv) in the event the defendant failed to deliver vacant possession by the said date, the plaintiff was "entitled to take eviction proceedings" against him.

As I said, there was a dispute about the amount payable. The agreement expressly provided in cl. 2 for the payment of RM30,000 but went on in cl. 2(b) to say that:

> the balance shall be paid immediately upon the Occupier his subtenants/licencees and all those lawfully claiming under him vacating the surrendered portion as hereinafter provided.

However, there is no dispute that the sum of RM30,000 was indeed paid.

It appears that the plaintiff did not take any steps to enforce the August 1983 agreement for quite some time. It issued writ only on 7 November 1991 The defendant entered appearance but defaulted in delivering his defence. So, on 26 May 1992 the plaintiff entered judgment in default of pleading. In the meantime, the defendant was adjudged a bankrupt on 16 April 1992. He took out a summons to set aside the default judgment. He served his summons on the plaintiff. Almost at once after being served with the defendant's summons, the plaintiff applied for a writ of possession and proceeded to execute it. Pursuant to the execution the defendant's goods were removed from the Semabok land. They were placed by the roadside near another land belonging to the plaintiff. A quantity of these goods were lost.

The default judgment was set aside on 28 November 1995, following which the defendant delivered his defence and counterclaim. On 17 September 1997 the defendant consented to judgment on the plaintiff's claim for vacant possession. Later, the defendant delivered an amended defence and counterclaim in which he grounded his case on trespass to goods, although he may well have relied on the tort of conversion as well. The learned judge found for the defendant. He held that although the bailiff had executed the writ of possession, the defendant's goods had been removed by the plaintiff's servants or agents. He also found that so far as the bailiff's role in the removal of the defendant's goods was concerned, he had acted as the plaintiff's agent. He concluded that the plaintiff had interfered with the defendant's goods without lawful justification. That finding, in my view, is correct. The writ of possession did not authorise the plaintiff to remove the defendant's goods. If the plaintiff wanted to have those goods removed, then it should have obtained an order from the court in that behalf.

The learned judge after referring to the judgment of Elphinstone CJ in *Marian Rebello v. K. Periathamby* (1931 – 1932) FMSLR 37 said (in the English translation of his judgment provided to us):

> In this case before me, PW2 had already prepared lorries and cranes to transport the Defendants goods, which were on the property in respect of which possession was granted to the plaintiff without an order to move the goods. By moving the goods to the roadside onto the land owned by the plaintiff without giving notice to the defendant and obtaining his permission to enter and remove the goods, the plaintiff had committed trespass and is liable for the loss of the defendant's goods.

In my judgment this is an entirely correct direction on the facts and the law. The plaintiff therefore rightly decided not to press its appeal on the issue of liability. That, then, leaves only the issue of damages.

In his pleaded case the defendant made the following claims: (i) that there was a sum of RM70,000 due to him from the plaintiff under the agreement of 11 August 1983; (ii) that the plaintiff had committed trespass on the land by executing the writ of possession without giving reasonable notice; (iii) that his goods had been converted by the plaintiff. After a trial at which viva voce evidence was led, the learned judge dismissed the plaintiff's claim and found for the defendant on its counterclaim. He proceeded to award a sum of RM400,000 as general damages and a sum of RM50,000 as exemplary damages. He also allowed the defendant's claim for RM70,000 as balance of the sum which the defendant said was due under 11 August 1983 agreement.

We were informed by counsel that when these appeals came before a differently constituted Bench, the defendant had informed the court that he was not supporting the learned judge's award of RM70,000. That award was, by consent, then set aside by that Bench.

The next item is the award of RM400,000. In support of this part of its case, the defendant called an expert witness. He was DW2 in the High Court. He got his information about the nature of the defendant's trade goods from the defendant himself. In the course of his arguments before us, learned counsel for the plaintiff submitted that the expert's evidence was hearsay. I cannot agree. The argument would have mattered if the defendant had not given evidence. But here the defendant did give evidence and was cross examined at length about the value of his trade goods. So, no question of hearsay arises.

But there is a more serious point taken by Mr Trevor George of counsel for the plaintiff which has merit. He says that the learned trial judge did not critically analyse the defendant's evidence on the value of his trade and business goods. The defendant's claim as formulated in his counterclaim was that the goods in question were worth more than RM800,000. What the learned judge did was to award about half that figure. In doing so, he accepted the defendant's version that the receipts for the goods had been lost. The learned judge then said (according to the translated version of his judgment):

> I accept the possibility that the said receipts existed but what is disputed is the value of the said goods. **Here I observe that the quantity of goods being claimed was not challenged.**
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> To ascertain the value of the goods, the Defendant called a registered valuer – DW4. DW4 could only give an estimated value but could not give the amount. (emphasis added.)

Let me say this about the learned judge's observations. First, in my judgment, he was perfectly entitled to make the findings he did about the lost receipts and this court, in accordance with well settled principles, should not interfere with his decision on the point. As recently as 27 June 2005, the Judicial Committee of the Privy Council in *Ryan v. Jarvis* [2005] UKPC 27, an appeal from Antigua & Barbuda, reiterated this point. Lord Hoffmann who delivered the advice of the Board said:

> It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.

Second, the learned judge correctly addressed his mind to the crucial fact that the plaintiff did not challenge the number of goods that formed the subject matter of the defendant's claim. This, of course, seriously restricts the plaintiff and this court from raising any question about the items that went missing. All that was left for the learned judge was to place a value on the missing goods. This is how he approached that issue:

> The Plaintiff had called two witnesses PW4 for the purpose of giving the pricing for the moulds and PW5, a mechanic, to ascertain the price of the machines. I am of the opinion that both of these witnesses are not experts, as they do not have the background, which qualifies them as experts. Not withstanding the same, I used their evidence for the purpose of obtaining a contrary view of the price of the goods claimed.

> The receipts for the goods claimed are lost. I also cannot accept the evaluation by DW4 totally as there are machines for instance, which had become scrap metal and it was also based on his opinion from the shops selling those goods.
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> In this case, the problem of damages arose because the plaintiff, with its rash behaviour, had caused the loss of the receipts of the goods claimed. I at the same time, reminded myself that there were goods lost which were more than 15 years old, there were machines which were left abandoned and covered with growth, left in the rain and heat but there were also some that I saw from the pictures taken at the side of Ayer Leleh which had not yet rusted.
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> …
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> The Plaintiff's and the Defendant's witnesses gave very different views. I hold that it would be more equitable to award RM400,000 as general damages with interest from the date of the filing of the Counter-Claim.

Earlier in his judgment the learned judge correctly described the defendant's claim amounting to RM835,095 as one for special damages. However, as may be seen from the passage just quoted, he made his award on the basis that the matter concerned general damages. The classification of the defendant's claim in his counterclaim as general damages is, with great respect to the learned judge, an error. General damages are awarded for harm that is not quantifiable. Special damages are awarded where the damage suffered is readily quantifiable in monetary terms. Damages for personal injuries suffered by a litigant are an example of general damages. So, an award for the loss of an arm sounds in general damages. Another example of general damages is compensation that is awarded by a court for injury to reputation. But a claim for the loss of actual earnings by an injured plaintiff is one for special damages. So, in this case, the value that is to be placed on the defendant's goods is something that is readily quantifiable and compensation for the loss of the goods is special damages.

But does this error flaw the judgment under appeal? With respect, I do not think that it does. What is of importance is the way in which the learned judge approached the issue and the considerations he took into account when making his award. In this respect I find his judgment beyond criticism. He took into account all those factors that usually influence a court making an assessment of special damages. He was clear in his mind that the defendant's valuation was far too excessive. He also gave due weight to the evidence of the plaintiff's witnesses on the issue of quantum. The issue is clearly one on which the opinion of individual judges is bound to differ. Hence the salutary rule that a court of appeal will not disturb a trial judge's views on matters of this nature. And I am really not convinced that the plaintiff has discharged its burden in this appeal by demonstrating that the learned judge's finding on quantum is unsupported by any evidence or suffers from an error in principle.

The approach of an appellate court to an appeal against quantum of damages in cases of special damage was referred to by Abdul Hamid CJ (Malaya) in *Tan Kuan Yau v. Suhindrimani* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323. That was a case in which the plaintiff had claimed loss of income in a personal injury action – a claim for special damages. The evidence was that the plaintiff's business was producing a profit of RM600. Yet the trial judge awarded RM1,000 per month. On appeal, the Supreme Court set aside the award. The learned Chief Justice of Malaya said:

> The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was **an omission on the part of the Judge to consider some relevant materials, or he had admitted for purposes of assessment some irrelevant considerations.** If the court is satisfied or convinced that the Judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial Judge.

Having given this case my most anxious consideration, I find the plaintiff to have fallen far short of the standard called for by the Chief Justice of Malaya in *Tan Kuan Yau v. Suhindrimani*. No appealable error has been demonstrated. I would therefore uphold the learned judge's award of RM400,000.

I now I turn to consider the award of exemplary damages. The basis for making an award of exemplary damages was set out by Lord Devlin in *Rookes v. Barnard* [1964] AC 1129, where after a discussion of some of the authorities on the subject he proceeded as follows:

> These authorities convince me of two things. First, that your lordships could not without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not therefore conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance which they may be said to afford.

The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category, – I say this with particular reference to the facts of this case, – to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not in my opinion punishable by damages.

Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. I have quoted the dictum of Erle, CJ, in *Bell v. Midland Ry. Co*. [1861] 10 CBNS at p. 304. Maule, J, in *Williams v. Currie* [1845] 1 CB at p. 848, suggests the same thing; and so does Martin B in an obiter dictum in *Crouch v. Great Northern Ry. Co.* [1856] 11 Exch. 742 at p. 759. It is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object, – perhaps some property which he covets, – which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

To these two categories, which are established as part of the common law, there must of course be added any category in which exemplary damages are expressly authorised by statute.

I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence. Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes* case (1763), Lofft 1, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if

> the conduct were criminal; and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham v. Gambling* [1941] AC 157, and place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough. Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant.
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> Thus a case for exemplary damages must be presented quite differently from one for compensatory damages; and the judge should not allow it to be left to the jury unless he is satisfied that it can be brought within the categories which I have specified.

It was submitted to us by learned counsel for the defendant that the present case comes within Lord Devlin's second category. With respect, I cannot agree. As I pointed out to Mr Thangaraj during argument, there was simply no evidential backing for the suggestion. What the plaintiff was seeking to do was to get possession of its land. It was entitled to have its land back. No question of obtaining a profit at the expense of the defendant's rights arises here. Mr Thangaraj said that the plaintiff had tried to steal a march on his client by seeking the writ of possession after it had notice of the application to set aside judgment. True enough. But that is not conduct calculated to make a profit at the defendant's expense. At best it was procedural misconduct for which they were mulcted in costs. That was their punishment. I will therefore say it once again: this is not a case for exemplary damages.

For the reasons already given, I would allow the plaintiff's appeal in part and set aside the award for exemplary damages. By reason of all that I have said thus far, the defendant's appeal against inadequacy of damages must a fortiori fail. Since the plaintiff has succeeded only in a small part of its appeal, I would award the plaintiff 15% of its taxed costs in its own appeal. It will have its full profit costs and out of pockets in the defendant's appeal. But it shall be entitled to only one item of getting up, that is to say in its own appeal. It shall not be allowed any getting up in the defendant's appeal. The deposits in both appeals will be paid out to the plaintiff, one by way of refund and the other as to account of taxed costs. I must say a word about the order for costs made in the court below. I do not think that it should be disturbed. That is because, the defendant was put to establishing its case of trespass; a case not controverted before us by the plaintiff.

I would dispose of these appeals in the foregoing terms. And by way of postscript I will add these remarks. When I first heard arguments, I thought that the award of RM400,000 should be substituted with an award of nominal damages. However, having read and re-read the judgment under appeal, I arrived at the conclusion that that award should not be disturbed for the reasons I have already given.

My learned brothers Mohd Ghazali bin Mohd Yusoff and Azmel bin Haji Maamor JJCA have seen this judgment in draft and have expressed their agreement with it.